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Before the
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Access Charge Reform

CC Docket No. 96-262

**REPLY TO OPPOSITIONS TO
PETITION FOR STAY PENDING JUDICIAL REVIEW**

The Bell Atlantic Telephone Companies

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SUMMARY

The Commission should grant the request for stay filed by Bell Atlantic (formerly NYNEX) of the Commission rule prohibiting the local exchange carriers from applying the per-minute residual transport interconnection charge ("residual TIC") to traffic that does not use the local exchange carrier's ("LEC's") Local Transport services. The parties opposing a stay do not present a shred of data to rebut Bell Atlantic's showing that the rule will have a disastrous financial impact on the Bell Atlantic telephone companies. No party disputes the fact that the rule will effectively prevent the Bell Atlantic telephone companies from being able to recover the residual TIC in collocated offices, even as to traffic that remains on Bell Atlantic's Local Transport services. No party has presented any justification for a rule that produces the illogical result of allowing some LECs to recover transport service related costs through presubscribed interexchange carrier charges ("PICCs'") to interexchange carriers that do not use the LECs' transport services, while preventing Bell Atlantic and other LECs from recovering non-transport service related costs through the residual TIC for the same type of traffic. Despite the commenters' allegations that the Commission provided adequate notice and opportunity for comment on the residual TIC rule, the record is clearly inadequate to support the Commission's action.

Bell Atlantic meets all four criteria for issuance of a stay. Bell Atlantic is likely to succeed on the merits of an appeal, since the Commission's rule

arbitrarily deprives Bell Atlantic of a reasonable opportunity to recover its remaining TIC costs. Bell Atlantic will be irreparably harmed by the rule. No party has shown how the Commission could make Bell Atlantic whole for the Local Transport business it will lose as a result of the untenable competitive position in which it is placed by the residual TIC rule. The commenters have not shown how a stay would harm others, since it would allow competitive local exchange carriers to compete with the LECs' Local Transport services in the same way that they do today for Special Access services, which are functionally similar. Nor have they shown how a stay would be contrary to the public interest. The residual TIC rule gives the competitive local exchange carriers an artificial pricing advantage that will impede competition and that will prevent customers from selecting the most efficient provider of Local Transport services. A stay of the rule is necessary to promote effective competition in the Local Transport market.

For these reasons, the Commission should stay the residual TIC rule pending judicial review.

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**REPLY TO OPPOSITIONS TO
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In its Petition for Stay, Bell Atlantic¹ demonstrated that the Commission's rule governing the application of the per-minute residual transport interconnection charge ("residual TIC") is arbitrary and capricious, and that it will cause irreparable harm to Bell Atlantic. No party provided any evidence to refute Bell Atlantic's showing that the prohibition on applying the residual TIC to Local Transport traffic that is carried by competitive local exchange carriers ("CLECs")² will also prevent the Bell Atlantic telephone companies from

¹ The Petition for Stay was originally filed by the NYNEX Telephone Companies, consisting of New York Telephone Company and New England Telephone and Telegraph Company. On August 14, 1997, these companies were merged with the Bell Atlantic Corporation, pursuant to the Commission's approval of the proposed acquisition of the NYNEX Corporation by Bell Atlantic. See In the Matter of Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, File No. NSD-L-96-10, Memorandum Opinion and Order, FCC 97-286, released August 14, 1997. Consequently, this filing refers to the applicants for stay as the "Bell Atlantic telephone companies" or "Bell Atlantic."

² In these comments, Bell Atlantic uses the term "CLEC" to refer both to carriers that offer competitive local exchange service through their own switches,

recovering the residual TIC on their own Local Transport traffic. No party has presented any justification for a rule that produces the illogical result of allowing some local exchange carriers ("LECs") to recover transport service related costs, as well as non-transport service related costs, through presubscribed interexchange carrier charges ("PICCs") to interexchange carriers that do not use the LECs' transport services, while preventing Bell Atlantic and other LECs from recovering non-transport service related costs through the residual TIC for the same type of traffic. And no party can show where these issues were addressed in this proceeding.

No party demonstrates that the Commission has identified all of the costs that are recovered in the residual TIC, or that the Commission has shown that these costs are all related to the LECs' transport services. Nor has any party alleged that the Commission has found that these costs should be disallowed. Nonetheless, the parties that oppose Bell Atlantic 's request for stay argue that there is nothing wrong with a rule which, they admit, will effectively prevent Bell Atlantic from recovering its residual TIC costs.

Clearly, there is nothing in the oppositions to Bell Atlantic 's stay request that justifies retention of the Commission's rule. Bell Atlantic meets all four

as well as to carriers that offer competitive Local Transport services by collocating in LEC end offices and tandem offices.

criteria for issuance of a stay.³ The Commission should stay the rule pending judicial review.

I. Bell Atlantic Is Likely To Succeed On The Merits

In its Petition for Stay, Bell Atlantic demonstrated that the Commission's residual TIC rule is inconsistent with the Commission's findings in the *Access Charge Reform Order*⁴ regarding the LECs' right to recover remaining TIC costs.⁵ Bell Atlantic also showed that the rule produces unreasonably discriminatory results among the LECs depending on the extent to which a LEC is able to recover remaining TIC costs through PICCs,⁶ and that the rule will hinder, rather than promote, competition.⁷ Several LECs agree with these conclusions, and support Bell Atlantic's request for stay.⁸ Only six parties, out of over 150 who commented in the Access Reform Proceeding, oppose Bell Atlantic's Petition for Stay.⁹

³ See Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

⁴ In the Matter of Access Charge Reform, CC Docket No. 96-262, First Report and Order, FCC 97-158, released May 16, 1997 ("*Access Charge Reform Order*"); *errata* released June 4, 1997.

⁵ See Bell Atlantic Petition for Stay at pp. 10-12.

⁶ See *id.* at pp. 13-16.

⁷ See *id.* at pp. 17-18.

⁸ See Comments of US West, Inc.; Ameritech; and the SBC Companies.

⁹ Oppositions were filed by Time Warner Communications Holdings, Inc. ("TW"); WorldCom, Inc. ("WorldCom"); LBC Communications, Inc. ("LBC"); Teleport Communications Group, Inc. ("TCG"); MCI Telecommunications Corp. ("MCI"); and Telecommunications Resellers Association ("TRA"). To ensure

No party claims that the Commission has disallowed the costs that are to be recovered through the residual TIC, or that the Commission has established a record sufficient to justify such a disallowance.¹⁰ The Commission decided to phase out the per-minute residual interconnection charge rate element. It did not -- and indeed, could not -- phase out the remaining TIC costs. However, as Bell Atlantic demonstrated, the Commission's rule will make it impractical for Bell Atlantic to recover the residual TIC in collocated offices, regardless of whether Bell Atlantic or a CLEC is an interexchange carrier's ("IXC's") provider of Local Transport services.¹¹

WorldCom argues that Bell Atlantic's inability to recover residual TIC revenues is a "fact of life" of the Commission's price cap system, under which the price cap LECs assumed the risk of lower demand.¹² However, this is not a case where Bell Atlantic may lose revenues due to normal competition. Rather, it is

adequate notice, Bell Atlantic served a copy of its Petition for Stay on all of the commenters in the Docket 96-262 rulemaking proceeding.

¹⁰ WorldCom argues that the Commission would be justified in making such a disallowance on the basis that the nature of the remaining TIC costs are "unknown." See WorldCom at pp. 5-6. However, it does not allege that the Commission actually ordered such a disallowance. The remaining TIC costs are the result of the Commission's Part 32 Accounting rules, Part 36 Separations rules, and Part 69 access charges rules. Since the Commission cannot identify the services or jurisdiction to which these costs should be assigned, and since the Commission has not shown that these costs are not "used and useful" in providing telephone service, it would be arbitrary and capricious, and confiscatory, for the Commission to deny the LECs a reasonable opportunity to recover these costs.

¹¹ See Bell Atlantic Petition for Stay, Affidavit of James Kane at p. 4.

¹² See WorldCom at p. 8.

the Commission's rule, which prohibits the LECs from applying the residual TIC if a customer does not use the LECs' Local Transport services, which will make it impossible for Bell Atlantic to recover residual TIC revenues or to compete effectively in the Local Transport market.

MCI argues that the Commission is not obliged to allow the LECs a reasonable opportunity to recover remaining TIC costs, because the LECs, and Bell Atlantic in particular, failed to submit data that would allow the Commission to identify these costs.¹³ This is incorrect. In its initial comments in this proceeding, Bell Atlantic submitted a direct cost study which showed that most of the TIC represents overallocations to the interstate jurisdiction of the costs of providing local exchange service in the state jurisdiction.¹⁴ Indeed, the Commission recognized that the TIC may be result, in part, from the operation of the Commission's separations rules.¹⁵ Until the Commission determines the true nature of remaining TIC costs, there is no basis for a rule that would effectively prevent the LECs from recovering those costs.

Those opposing a stay do not dispute Bell Atlantic's showing that the Commission's decision to prevent the LECs from recovering remaining TIC revenues through the residual TIC on CLEC transport is inconsistent with the Commission decision to allow the LECs to recover the same type of costs

¹³ See MCI at p. 7.

¹⁴ See Joint Comments of Bell Atlantic and NYNEX, filed January 29, 1997, at p. 37 & Exhibit 2.

¹⁵ See *Access Charge Reform Order* at para. 225.

through the PICCs, which apply regardless of whether the LEC or a CLEC provides transport services.¹⁶ Their response is that companies, such as Bell Atlantic, that have substantial residual TIC rates should simply forego the revenues by reducing or eliminating the rate element.¹⁷ However, since the Commission's rules do not allow the LECs to reduce rates selectively only in collocated offices, Bell Atlantic would have to reduce or eliminate the residual TIC in an entire study area.¹⁸ For this reason, Bell Atlantic would have to reduce

¹⁶ MCI argues that Bell Atlantic has misread the *Access Charge Reform Order*, and that the Commission's rules do not permit the LECs to recover transport service-related costs through PICCs. See MCI at p. 10. To the contrary, it is MCI who has misread the order. As of January 1, 1998, two thirds of the LECs' tandem switching costs will not be assigned to the tandem switching rates. These costs will be assigned to "residual interconnection charge revenues," which will be recovered through the PICC to the extent that the PICC is below the cap. See *Access Charge Reform Order* at para. 239; 47 C.F.R. Section 69.153(a). The Commission's rules do not distinguish between service-related and non-service-related costs in assigning residual interconnection charge revenues to PICCs. In fact, Bell Atlantic estimates that some LECs will establish PICCs in the January 1, 1998 tariff revisions and in later filings consisting entirely of service-related residual interconnection charge costs.

¹⁷ See, e.g., WorldCom at pp. 7-8; MCI at p. 9.

¹⁸ See 47 C.F.R. Section 69.3(e)(7). While the *USPP Waiver Order* allows Bell Atlantic to establish lower TIC rates in New York LATA 132, Bell Atlantic would have to reduce the TIC throughout the Northeast region, since Bell Atlantic has collocated offices in operation, or on order, in all study areas in the Northeast. See NYNEX Telephone Companies Petition for Waiver, Transition Plan to Preserve Universal Service in a Competitive Environment, 10 FCC Rcd 7445 (1995) ("*USPP Waiver Order*") at para. 55. WorldCom asks the Commission to clarify whether the *USPP Waiver Order* has any continuing validity in light of the changes adopted in the *Access Charge Reform Order*. See WorldCom at n.10. This request is outside of the scope of Bell Atlantic's Petition for Stay. Bell Atlantic has established zone pricing for the TIC in LATA 132, and those price cap service sub-categories are unaffected by the changes that the Commission has made in other areas, such as the recovery of Long Term Support and the establishment of PICCs.

or eliminate approximately \$370 million in residual TIC revenues in the Northeast region.¹⁹ This is clearly a confiscatory result, and it demonstrates the harm that the Commission's rule produces for LECs that have substantial residual TIC rates under the Commission's new rate structure, a harm that does not affect LECs who can recover remaining TIC costs through PICCs.

TW offers the creative suggestion that the Commission resolve the inconsistency by issuing a *sua sponte* reconsideration order prohibiting application of PICCs as well when a customer uses CLEC transport.²⁰ However, this proposal would require further notice and comment to explore the ramifications for the Commission's transitional rate structure.²¹ The Commission should not compound the substantive and procedural infirmities of its residual TIC rule with a hasty and unsubstantiated revision to the PICC rule.

Those opposing a stay offer no additional justification for the Commission's rule. They merely repeat the Commission's findings that it would harm competition if the LECs applied the residual TIC to minutes of use that are routed to transport services of the CLECs.²² They do not explain how it will harm competition if the LECs recover costs through the residual TIC that are not

¹⁹ See Bell Atlantic Petition for Stay, Affidavit of Frank J. Gumper at p. 2.

²⁰ See TW at p. 10.

²¹ For instance, such a rule would prevent the LECs from recovering costs in the PICCs that do not represent transport service-related costs, which clearly would be confiscatory.

²² See, e.g., TRA at pp. 12-13; MCI at pp. 6-8; TCG at pp. 7-9; WorldCom at pp. 5-6.

related to transport service from all of their access customers, including those that use the transport services of other carriers.²³ Some commenters admit that the residual TIC recovers costs that are not, in any way, interstate transport costs.²⁴ None dispute the Commission's finding that the nature of the remaining non-service related TIC costs is "unknown," and will require further study.²⁵ Since these costs cannot be attributed to the LECs' transport services, the record does not support the Commission's conclusion that applying the residual TIC to all switched minutes of use will harm competition.

Even as to the service-related costs in the residual TIC, the commenters do not show that it would harm competition if the LECs recovered these costs from customers who use the CLECs' dedicated transport services. The Commission's transition plan will require the LECs to recover two-thirds of their remaining tandem switching costs from users of both tandem switched transport ("TST") and dedicated transport services. Thus, users of LEC dedicated transport services will subsidize users of LEC TST services. Yet, if a customer uses a CLEC

²³ TW admits that the Commission's analysis is only relevant to the service-related portion of the residual TIC. *See* TW at pp. 8-9.

²⁴ *See, e.g.,* TCG at p. 3, n.9; TW at pp. 5-6.

²⁵ *See* Bell Atlantic Petition for Stay at p. 12, *citing* Access Charge Reform Order at para. 231. WorldCom argues that Bell Atlantic "concedes" that the TIC is a transport-related charge. *See* WorldCom at p. 5. This is a mischaracterization of Bell Atlantic's comments. Bell Atlantic observed that the TIC was created as a residual from the original transport rate restructure. However, the fact that the Commission's rules allocate excessive costs to the interstate Local Transport category does not show that these costs are related to the LECs' provision of transport services.

dedicated transport service, it will be able to avoid this subsidy by not paying the residual TIC. The LEC will have to continue to serve its TST customers without recovering all of the tandem switching costs imposed by those customers. No party shows why it is reasonable for the Commission to require the LECs to continue to subsidize their TST rates, but to prohibit the LECs from collecting this subsidy when a dedicated transport customer moves its traffic to CLEC dedicated transport services.

Several petitioners argue that the residual TIC rule is a necessary response to the *CompTel*²⁶ decision, where the Court required the Commission to complete the transition to cost-based transport rates or to justify why a non-cost based TIC should be retained.²⁷ However, the Commission thoroughly addressed the *CompTel* decision through its transition plan, which will eliminate the TIC rate element through various mechanisms over a defined time period. The prohibition on collecting the residual TIC on CLEC transport does not address anything in the *CompTel* decision. In fact, Bell Atlantic showed that the residual TIC rule will undermine the transition plan by preventing the LECs from shifting the appropriate costs to the PICCs and the TST rate elements due to the effects of the price cap mechanism.²⁸

²⁶ *Competitive Telecommunications Assoc. v. FCC*, 87 F.3d 522 (D.C. Cir. 1996) ("*CompTel*").

²⁷ See *WorldCom* at pp. 6-7; *TCG* at p. 9; *TW* at p. 7.

²⁸ See *Bell Atlantic Petition for Stay* at pp. 14-15.

Some commenters argue that the residual TIC rule is an integral part of the Commission's market-based approach to access charge reform, and that Bell Atlantic is seeking to protect itself from competition through a "guaranteed" revenue stream.²⁹ This is incorrect. The residual TIC rate element is subject to the same competitive pressures as the LECs' other Switched Access rate elements. CLECs can, and do, operate their own switched access services, through their own switches, in most of the major cities in the country. To the extent that the residual TIC increases the LECs' total charges for Switched Access minutes of use, it subjects the LECs to competitive pressure from alternative providers, who are under no regulatory requirement to apply this, or any other, Part 69 rate element.

The commenters claim that application of the residual TIC to CLEC transport will require the CLECs to subsidize the LECs' transport services.³⁰ Just the opposite is true. The residual TIC includes substantial costs that the LECs

²⁹ See, e.g., TW at p. 12. TW argues that recovery of non-service related costs through the residual TIC on CLEC transport would amount to "bulk billing," which the Commission rejected because it would insulate the LECs from the effects of competition. See TW at p. 9. This is incorrect. Bulk billing is a mechanism by which a LEC could recover costs from IXCs regardless of whether an IXC uses the LEC's access services. See *Access Charge Reform Order* at para. 241. Here, the residual TIC only applies to minutes of use on the LECs' Switched Access services. The Commission adopted the residual TIC rate element precisely because it was not a bulk billing mechanism. The only issue is whether applying that rate element to all of the LECs' Switched Access minutes of use would harm transport competition. As Bell Atlantic demonstrated in the Petition for Stay and as it shows in this Reply, the answer is no.

³⁰ See, e.g., WorldCom at pp. 3-4.

will continue to incur regardless of whether a customer uses CLEC transport. By refraining from applying the residual TIC to those customers, the LECs would be subsidizing the customers that purchase CLEC transport services.

The commenters disagree with Bell Atlantic's argument that the Commission adopted the residual TIC rule without adequate notice and opportunity for comment.³¹ The commenters concede that the residual TIC rule was not mentioned in the Commission's Notice of Proposed Rulemaking, but they claim that it is a "logical outgrowth" of the Commission's proposals.³²

If the residual TIC rule was a logical outgrowth of these proposals, the issue would have been adequately addressed. In the *Access Reform NPRM*, the Commission discussed four options for revising the TIC, none of which combined a residual TIC to recover non-service related costs with a rule that would prevent the LECs from applying it to CLEC transport.³³ Out of 150 comments, only one arguably proposed such a rule, in a single paragraph.³⁴ The

³¹ See MCI at pp. 3-5; TCG at pp. 11-14; WorldCom at pp. 9-10; TW at pp. 13-17.

³² See, e.g., TCG at p. 12; WorldCom at p. 9.

³³ See *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Notice of Proposed Rulemaking, FCC 96-488, released December 24, 1996 ("*Access Reform NPRM*") at paras. 112-118.

³⁴ See TW Comments, filed January 29, 1997, at pp. 14-15. WorldCom opposed applying the TIC on CLEC transport, but only as part of its proposal to require the LECs to restructure the TIC as a flat-rated charge on end users or presubscribed IXCs. See WorldCom Comments, filed January 29, 1997, at pp. 65-66. TCG and Sprint proposed that the Commission prohibit the LECs from applying the remaining TIC to CLEC transport only to the extent that the TIC recovered service-related costs. See TCG Comments, filed January 29, 1997, at p. 33; Sprint Comments, filed January 29, 1997, at p. 30.

Commission issued its decision primarily on the basis of last-minute lobbying by CompTel and TCG.³⁵ If the staff had indicated that it was giving this proposal serious consideration and had sought input from the industry, Bell Atlantic and other companies could have provided information about the effect of the rule and could have explained the inconsistency with the rest of the access rate structure that the Commission was considering. The Commission should remedy this situation by staying the residual TIC rule pending judicial review.

II. No Party Rebutts Bell Atlantic 's Evidence That It Will Suffer Irreparable Harm Absent A Stay.

The parties opposing a stay argue that Bell Atlantic has not shown that it will suffer irreparable harm absent a stay because (1) Bell Atlantic is exaggerating its potential financial losses;³⁶ and (2) financial losses do not constitute irreparable harm because the Commission can make Bell Atlantic whole at a later date.³⁷ Neither contention is valid.

No party provided any data to rebut Bell Atlantic 's showing that the rule prohibiting the LECs from recovering the residual TIC on CLEC transport will make it virtually impossible for Bell Atlantic to retain residual TIC revenues in collocated offices even on traffic that uses Bell Atlantic's Local Transport services. Bell Atlantic showed that the residual TIC rate will be as much as ten

³⁵ See *Access Charge Reform Order* at para. 179 n. 242.

³⁶ See, e.g., TCG at p. 15; WorldCom at pp. 10-11.

³⁷ See, e.g., TRA at pp. 7-8; TW at pp. 17-18.

times the rate for the associated Local Transport facility.³⁸ Given this disparity, it would be far less expensive for a customer to use a CLEC's Local Transport services even if Bell Atlantic charged nothing for its own Local Transport services. A customer would not stay on Bell Atlantic's Local Transport services unless Bell Atlantic waived the residual TIC rate, which it would have to do in both collocated and non-collocated offices throughout the region.³⁹ Bell Atlantic showed that it had at least \$90 million of residual TIC revenues, and \$18 million in Local Transport revenues, at risk in the Northeast region in offices already subject to collocation.

Bell Atlantic's inability to recover these revenues is not mere speculation, as some of the commenters allege.⁴⁰ Bell Atlantic's own IXC customers have told it that they intend to take advantage of the residual TIC exemption by shifting their transport business to the CLECs, and none of the IXCs have come forward in this proceeding to contradict this.⁴¹ Indeed, the parties opposing a stay concede that Bell Atlantic will have to forego substantial residual TIC revenues if it hopes to retain any Local Transport traffic.⁴² Since the residual TIC is so much

³⁸ See Bell Atlantic Petition for Stay at pp. 19-23.

³⁹ See note 18 *supra*.

⁴⁰ See, e.g., TRA at pp. 6-7; TCG at pp. 15-16.

⁴¹ See Bell Atlantic Petition for Stay, Affidavit of James Kane at p. 4. Indeed, AT&T and TCG have filed petitions for reconsideration of the Access Charge Reform Order urging the Commission to make the residual TIC exemption effective immediately. This shows that they fully intend to take advantage of this rule. See AT&T Petition for Reconsideration at pp. 10-12; TCG Petition for Reconsideration at pp. 2-4.

⁴² See, e.g., MCI at p. 13; TRA at p. 7; WorldCom at p. 11.

larger than the associated Local Transport rate, Bell Atlantic is faced with two equally bleak choices; either (1) substantially eliminate the residual TIC in the hope of retaining as much as possible of the existing \$18 million in collocated Local Transport revenues;⁴³ or (2) maintain the residual TIC rate for as long as possible while the IXCs shift their traffic to collocated CLECs. In either case, Bell Atlantic is facing the imminent prospect of losing tens of millions of dollars.

Such financial losses are “irreparable” if they cannot be recouped, as the Commission and some of the commenters recognize.⁴⁴ Loss of business qualifies as irreparable harm if it cannot be remedied at a later date.⁴⁵ Increases in the residual TIC at a later time to make Bell Atlantic whole would raise objections about rate churn and substantial increases in rates to IXCs and their end users. In addition, the Commission may decide that it does not have an obligation to

⁴³ TRA speculates that Bell Atlantic will not have to reduce the residual TIC, because the CLECs may not pass along the “effective price reduction” of the residual TIC exemption to their Local Transport customers. TRA at p. 7. In other words, TRA thinks that the CLECs will raise their existing Local Transport rates to include part of the benefit their customers would enjoy by not paying the residual TIC to Bell Atlantic. A substantial increase in CLEC rates is hardly what the Commission had in mind when it found that the residual TIC rule would increase competition. In any event, such an increase is unlikely in view of the fact that the IXCs are capable of establishing their own collocated facilities if the CLECs try to recapture the residual TIC revenues.

⁴⁴ See In the Matter of Access Charge Reform, CC Docket No. 96-262, Order, FCC 97-216, released June 18, 1997, at para. 30 (“the threat of unrecoverable economic loss ‘does qualify as irreparable harm,’” citing Iowa Utilities Board v. FCC, 109 F.3d 418, 426 (8th Cir.); See, e.g., TW at 17-18; MCI at p. 14.

⁴⁵ See, e.g., New England Telephone and Telegraph Company and New York Telephone Company vs. FCC, Case No. 93-1734, (D.C. Cir.), Order, released November 8, 1993 (granting a stay of a Commission order suspending NYNEX Enterprise tariff provisions).

make Bell Atlantic whole for any voluntary reduction in the residual TIC that Bell Atlantic makes in an attempt to retain Local Transport traffic. Even if a Court required the Commission, on remand, to restore the residual TIC revenues, neither the Court nor the Commission could force the IXC's to abandon the CLECs and shift their traffic back to Bell Atlantic's Local Transport services. No party disputes this.

It is clear that the Commission's rule will cause Bell Atlantic to suffer severe financial losses that Bell Atlantic will be powerless to recoup regardless of the actions it takes to respond to competition. The comments in this proceeding have only confirmed Bell Atlantic's fears that the Commission's rule places it in a no-win situation. The Commission should grant an immediate stay to prevent the unavoidable harm that will be caused by the Commission's rule.

III. A Stay Would Not Harm Others.

The commenters argue that the CLECs will be unable to compete if the residual TIC is applied to all traffic, disputing Bell Atlantic's contention that the CLECs already compete very successfully in the Local Transport market.⁴⁶ These arguments are both illogical, and contrary to fact.⁴⁷ Local Transport services are functionally similar to Special Access services, where the CLECs undeniably

⁴⁶ See WorldCom at pp. 11-12; MCI at pp. 11-12; TW at pp. 18-20; TCG at pp. 16-17.

⁴⁷ See, e.g., MCI at pp. 11-12 (noting that Bell Atlantic faces "significant competition" from the CLECs).

have obtained a large market share in many major cities.⁴⁸ As a result of the Commission's *Local Transport Restructure Orders*,⁴⁹ the LECs apply dedicated and common transport rates that are based on their Special Access rates for similar facilities. Dedicated Local Transport service is substantially the same as High Capacity service from an end office to an IXC point of presence ("POP"). If a CLEC can compete with a LEC's rates for Special Access services from an end office to an IXC POP, it can compete equally well with the LEC's rates for dedicated Local Transport services from the end office to the IXC POP, regardless of the level of the LEC's per-minute access charges.

In fact, the CLECs have used collocation to compete successfully for both Special Access and Local Transport services. WorldCom complains that Bell Atlantic has not provided record information about the extent of competition for Local Transport service.⁵⁰ While Bell Atlantic cannot publicly disclose information about the traffic carried by collocated competitors, Bell Atlantic can state that it has already established almost 150 collocation sites in 46 end offices

⁴⁸ For example, the CLECs have over 50 percent of the High Capacity Special Access market in the New York City metropolitan area, and they have made similar inroads in other cities. See NYNEX Request to Extend USPP Waiver to Eastern Massachusetts LATA 128, filed December 10, 1996. See also In the Matter of Application of Bell Atlantic Corporation and NYNEX Corporation for Consent to Transfer Control of Licenses and Authorizations, NSD-L-96-10, *Ex Parte* filed June 25, 1997.

⁴⁹ See Transport Rate Structure and Pricing, CC Docket No. 91-213, 7 FCC Rcd 7006 (1992); *recon.* 8 FCC Rcd 5370 (1993); *further recon.* 8 FCC Rcd 6233 (1993); *further recon.* 10 FCC Rcd 3030 (1994); *further recon.* 10 FCC Rcd 12979 (1995) ("*Local Transport Restructure Orders*").

⁵⁰ See WorldCom at p. 12.

in the Northeast region, and more are on order. CLECs are providing both Switched Access and Special Access transport services at those sites, and they have been very successful in bidding for IXC Switched Transport accounts. For example, Bell Atlantic bid for, and lost, a contract to provide essentially all of a particular IXC's Switched Transport services in the New York collocated offices, and the CLECs already have rolled over substantial numbers of DS3 Switched Transport trunks from Bell Atlantic's Local Transport services in these offices.⁵¹

No party disagrees that a stay would simply maintain the status quo, under which the current interconnection charge applies to all Switched Access traffic that is routed to collocated CLEC transport. WorldCom argues that the existing TIC has impeded competition by requiring the CLECs' customers to pay part of the LECs' Local Transport costs.⁵² While Bell Atlantic disagrees with that assessment, given the success of the CLECs under the Commission's collocation policies, the Commission has largely addressed this issue by moving most of the service-related transport costs to the LECs' Local Transport rates. Even with a stay of the residual TIC rule, the Commission's action will improve the

⁵¹ See Bell Atlantic Petition for Waiver, Affidavit of James Kane, at p. 4; *see also* Bell Atlantic and NYNEX Comments, Commission Actions Critical to the Promotion of Efficient Local Exchange Competition, CCB Pol. No. 97-9, filed August 11, 1997; In the Matter of Application of Bell Atlantic Corporation and NYNEX Corporation for Consent to Transfer Control of Licenses and Authorizations, NSD-L-96-10, *Ex Parte* filed June 25, 1997.

⁵² See WorldCom at pp. 11-12.

competitive position of the CLECs, since it will substantially increase the LECs' TST rates.⁵³

A stay of the residual TIC rule would simply prevent traffic from falling into the laps of the CLECs due to a pricing differential that would create an irresistible incentive for IXCs to shift to CLEC transport regardless of whether the LEC was the more efficient provider. No party can claim to be harmed by the denial of an uneconomic pricing advantage.

IV. A Stay Would Be In The Public Interest.

The commenters have not shown how it would be in the public interest to allow the residual TIC rule to go into effect. WorldCom argues that a stay would not be in the public interest because it would shield residual TIC revenues from the effects of competition.⁵⁴ This is based on the unjustified assumption that the only competition between LECs and CLECs is in the collocated transport market. Nothing could be farther from the truth. Residual TIC revenues will also be at risk due to increased local exchange competition as the CLECs win local customers and provide access services to IXCs serving those customers. The CLECs already compete in the Bell Atlantic operating territory as full service

⁵³ CompTel has argued that the Commission is moving excessive costs to the TST rates. *See* CompTel Petition for Reconsideration, CC Docket 96-262, filed July 11, 1997, at p. ii. While Bell Atlantic does not agree with this argument, it shows that purchasers of LEC TST services are concerned about LEC rate increases and are likely to seek out alternative transport services from the CLECs.

⁵⁴ *See* WorldCom at pp. 12-13.

providers of local exchange and exchange access services. As Bell Atlantic demonstrated in the Commission's competition docket, the CLECs provide service through at least 25 local switches in the New York Metro area alone, and Bell Atlantic has assigned more than 600 NXX codes to the CLECs that serve the Northeast region.⁵⁵ While only the CLECs know how many of these telephone numbers have been activated, Bell Atlantic has reason to believe, based on the amount of traffic that Bell Atlantic exchanges with CLEC switches, that the CLECs are providing hundreds of thousands of telephone lines. The rapid growth of dial tone competition in the Bell Atlantic operating territory proves that none of Bell Atlantic's Switched Access rates are, or will be, immune from competition, including the per-minute residual TIC.

Contrary to TW's arguments, increased competitive losses due to an artificial pricing advantage is not a public benefit.⁵⁶ The Commission can encourage real competition, and eliminate the uncertainty about the availability of this apparent windfall, by staying the residual TIC rule at this time, before the CLECs and the IXCs make inefficient investments and commitments based on an uneconomic rate structure.

⁵⁵ See Bell Atlantic and NYNEX Comments, Commission Actions Critical to the Promotion of Efficient Local Exchange Competition, CCB Pol. No. 97-9, filed August 11, 1997, at p. 3.


⁵⁶ See TW at p. 20.

V. Conclusion

It is clear that the residual TIC rule will irreparably harm Bell Atlantic, and that it will prevent Bell Atlantic from competing for Local Transport traffic on a fair and equitable basis. The Commission should grant Bell Atlantic's stay request.

Respectfully submitted,

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Dated: August 15, 1997

CERTIFICATE OF SERVICE

I hereby certify that copies of this pleading were mailed this date, first class postage prepaid, upon the persons listed on the attached service list.



Joseph Di Bella

Dated: August 15, 1997